



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

**SUBJECT:** Impartiality Determination to Participate in Certain Matters Involving the State of Washington

**FROM:** Justina Fugh  
Alternate Designated Agency Ethics Official and  
Director, Ethics Office

Digitally signed by Justina  
Fugh  
Date: 2021.01.26  
14:47:40 -05'00'

**TO:** Casey Katims  
Deputy Associate Administrator for Intergovernmental Affairs  
Office of Congressional and Intergovernmental Relations

As the Deputy Associate Administrator for Intergovernmental Affairs for the Office of Congressional and Intergovernmental Relations (OCIR) of the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the State of Washington. Within the last year, prior to being selected for this position, you served as the Director of Federal and Inter-State Affairs for Washington Governor Jay Inslee.

Under President Biden's Ethics Pledge, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state government is excluded under the definition of "former employer."<sup>1</sup> Therefore the Ethics Pledge does not apply to your State of Washington employment. But since federal ethics rules do not contain a similar exclusion for state government, those rules do apply to your employment with the State of Washington.

What remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." Upon assuming the position of Deputy Associate Administrator for Intergovernmental Affairs, you will have a "covered relationship" with the State of Washington pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date your employment with the Governor's Office terminated, absent an impartiality determination from me, you cannot participate in any specific party matter in which the State of Washington is a party or represents a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

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<sup>1</sup> *See* Exec. Order 13989, Section 2(k), which provides that "'former employer' does not include...State or local government."

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that EPA takes into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

In reviewing these factors, I have concluded that the interest of the United States Government in your participation outweighs any concerns about your impartiality, and I am authorizing you to participate as Deputy Associate Administrator for Intergovernmental Affairs for OCIR in particular matters that involve the State of Washington with the following limitation: you must recuse yourself from participation in specific party matters in which you participated personally and substantially while employed with the Governor's Office. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2018, you have served as the Director of Federal and Inter-State Affairs for Washington Governor Jay Inslee. In this role, you served as the primary federal policy advisor to Governor Inslee and directed the State of Washington's engagement with Congress, the White House, federal agencies, fellow governors' offices, other states, and various other stakeholders in D.C. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for the Governor's Office. States share responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with state governmental entities on a continuing and frequent basis.

Effect of the matter upon your financial interest – I understand that you have a defined contribution plan and a defined benefit plan with the State of Washington. As such, you have a financial conflict of interest pursuant to 18 U.S.C. § 208. Under this criminal statute, you cannot participate personally and substantially in any particular matter that will affect the State's ability or willingness to honor its contractual obligations with respect to your state retirement interests. But pursuant to the regulatory exemptions, this personal financial interest is not a disqualifying one that raises concerns about participation in particular matters affecting the holdings of the plan or in particular matters of general applicability affecting the sponsor of the plan under the federal conflicts of interest statute. See 5 C.F.R. §§ 2640.201(c)(1)(ii), 2640.201(c)(1)(iii), and 2640.201(c)(2). In EPA's experience, it is unlikely you, as the Deputy Associate Administrator

for Intergovernmental Affairs, will be in any position to affect the State's ability or willingness to pay these benefits to its retirees.

Nature and importance of the employee's role – As Deputy Associate Administrator for Intergovernmental Affairs, you serve as the Agency's principal point of contact with states and local governments. You help facilitate interactions with states and local governments and coordinate those activities with EPA's regional offices. In this role, you are expected to communicate freely with states, including Washington.

Sensitivity of the matter – We anticipate that there may be specific party matters in which you did not participate personally and substantially for the Governor's Office that will rise to your level of attention, merit your participation and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation as Deputy Associate Administrator for Intergovernmental Affairs in such matters will be of importance to the Administrator, and therefore, in the Agency's interests. In these situations, it may not be appropriate to reassign the matter to another employee.

Under this limited authorization, you are authorized to participate in new or future specific party matters that involve the State of Washington, but not on the very same specific party matters on which you worked on personally and substantially while employed by the Governor's Office. With respect to any particular matters involving Washington as a specific party and in which you previously participated personally and substantially, you have voluntarily agreed, pursuant to our advice, not to participate at all for the duration of your EPA tenure. If the Agency determines that it has a compelling reason for your participation as an EPA official on any of those same specific party matters that you participated in personally and substantially, then you may ask OGC/Ethics to reconsider the factors and information listed above on a case-by-case basis. Unless and until you receive written authorization, you must continue to recuse yourself from those matters in which you had previously participated while OGC/Ethics considers whether the Agency's interest in your participation outweighs any impartiality concern.

While I have issued you this determination to interact with the State of Washington with the limitation described above, you may wish to make adjustments to your duties to not participate in a particular matter that involves Washington. Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters, although you are advised to confer with OGC/Ethics should such a circumstance arise.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact me at [fugh.justina@epa.gov](mailto:fugh.justina@epa.gov) or (202) 564-1786.

cc: Robin H. Richardson, Deputy Associate Administrator  
Radha Adhar, Deputy Associate Administrator for Congressional Affairs



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

**SUBJECT:** Impartiality Determination to Participate in Certain Specific Party Matters  
Involving the Natural Resources Defense Council

**FROM:** Justina Fugh Digitally signed by Justina Fugh  
Date: 2021.06.24  
22:33:48 -04'00'  
Alternate Designated Agency Ethics Official and  
Director, Ethics Office

**TO:** Marianne Engelman-Lado  
Deputy General Counsel for Environmental Initiatives

Prior to entering federal service on January 31, 2021, you directed two environmental justice clinics --first at Yale University and then at Vermont Law School – both of which provided legal services to clients and trained law students in community lawyering and civil rights enforcement. As part of the Vermont Law School environmental justice clinic, you and co-counsel Southern Environmental Law Center (SELC) submitted requests for certain EPA records pursuant to the Freedom of Information Act (FOIA) on behalf of several clients, including the Natural Resources Defense Council (NRDC).

Because NRDC was a “former client” of yours for federal ethics purposes and under Executive Order 13989, you could not participate in any specific party matter involving this entity unless you first sought and obtained ethics approval. The Designated Agency Ethics Official granted you a waiver from the Executive Order on April 14, 2021, and this memorandum formally confirms my impartiality determination granted orally on that same date.

**NEED FOR A PLEDGE WAIVER**

Pursuant to Executive Order 13989, you signed the Ethics Pledge and are prohibited from participating in specific party matters in which your former employer or former client (as defined in Section 2, paragraphs (k) and (l)) is a party or represents a party. Mindful of the fact that you had previously provided limited legal services to NRDC solely in the context of FOIA, and given the Agency’s interest in having your participation in environmental matters with NRDC that are unrelated to FOIA, the EPA sought a waiver of the provisions of Section 1, paragraph 2 of the Executive Order on your behalf. This limited waiver, which was granted on April 14, 2021, authorized you to participate personally and substantially in specific party matters arising at EPA in which your former client, NRDC, is a party, provided that you did not previously participate personally and substantially in that same matter for NRDC or any other party. *See attachment.*

## NEED FOR IMPARTIALITY DETERMINATION

What remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, Subpart E, “Impartiality in Performing Official Duty.” For one year from the date you last provided services to NRDC, you have a “covered relationship” with them pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). Absent an impartiality determination from me, you still cannot participate in any specific party matter in which NRDC is a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a). Although I granted this determination informally previously, I am confirming it in writing now.

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee’s participation outweighs concern over the questioning of the “integrity of the agency’s programs and operations.” 5 C.F.R. § 2635.502(d). The factors that EPA takes into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee’s role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee’s duties that would reduce or eliminate the likelihood that a reasonable person would question the employee’s impartiality.

Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as Deputy General Counsel for Environmental Initiatives in specific party matters in which NRDC is a party, provided that you did not participate personally and substantially in the matter previously with NRDC or any other party. In making this determination to enable you to effectively carry out your duties as a Deputy General Counsel and to advance the interests of the Agency, I have taken the following factors into consideration:

Nature of the relationship involved – Your career has been devoted to civil rights and environmental justice. After graduating with your B.A. in government from Cornell University, a J.D. from the University of California at Berkeley, and an M.A. in Politics from Princeton University, you served as a staff attorney at the NAACP Legal Defense and Educational Fund, Inc., where you represented clients attempting to break barriers of access to health care and quality education. You also served for ten years as General Counsel at New York Lawyers for the Public Interest (NYLPI), a non-profit civil rights law firm, where you directed a legal and advocacy program addressing racial and ethnic disparities in access to health care, environmental justice, and disability rights. In addition to lecturing and teaching about environmental justice, you also directed environmental justice clinics at Vermont Law School and Yale University.

Throughout your career, you have represented individual clients and nonprofits alike on a broad array of environmental law and environmental justice issues. Although NRDC frequently interacts with the Agency on regulatory matters and in litigation, I note that your own previous affiliation with NRDC was limited in scope. As set forth in the Biden pledge waiver issued on April 14, 2021, your previous service to NRDC was limited to FOIA requests on Title VI inquiries only, not related to any actual or underlying Title VI matters. In fact, you did not otherwise serve as the attorney of record for NRDC. Therefore, your prior relationship with NRDC does not weigh against you for the purposes of this factor.

Effect of the matter upon your financial interest – NRDC did not compensate you directly for your services; instead, any financial remuneration was paid to your former employer, Vermont Law School. You do not have a financial conflict of interest with the Vermont Law School.<sup>1</sup>

Nature and importance of the employee's role – In addition to serving as the chief legal advisor to EPA and implementing the nation's environmental laws, the Office of General Counsel also provides legal counsel to EPA policymakers and represents the Agency in defense of agency actions. In the position of a Deputy General Counsel, you must be able to advise senior leadership and provide legal counsel and vital input into the Agency's programs and litigations, including those that address pesticides and toxic chemicals among other areas. Your invaluable knowledge and experience are of great importance in advocating the interests of the Agency and in advising the Acting General Counsel and Administrator.

Sensitivity of the matter – We anticipate that specific party matters in which NRDC is a party and that did not involve you personally and substantially may arise during your EPA tenure that will merit your attention and participation because they raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Although EPA currently has two other political appointees in OGC, both have their own bar and pledge obligations to observe with respect to matters arising in the Office of General Counsel. Consequently, there is an overlap of recusals that is impinging the ability of the Office of General Counsel to interact with its political leadership on certain nationally significant issues related to public health and the environment that are important priorities of the Administration. With respect to the other political appointees, one is recused because NRDC is her "former employer" for purposes of Executive Order 13989, while the other appointee is recused given prior service as an employee in a State government. Your participation as part of your official duties as a Deputy General Counsel is of importance to the continued functioning and continuity of the Office of General Counsel and, therefore, is in the Agency's interests.

Under this limited authorization, you may participate personally and substantially in specific party matters that involve NRDC, so long as they are not the very same specific party matters on which you worked personally and substantially for NRDC or any other party. You will be allowed to participate in these specific party matters, including meetings or communications related to your official duties, where NRDC is present. However, you will

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<sup>1</sup> See note to 5 C.F.R. § 2640.201(c).



remain recused from those specific party matters, including Title VI matters and FOIA requests, in which your former client is a party or if you participated personally and substantially previously. You will otherwise fully comply with the remainder of the requirements imposed by the Executive Order 13989 and with all applicable federal ethics laws and regulations, as well as your own attorney bar obligations.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact me at [fugh.justina@epa.gov](mailto:fugh.justina@epa.gov) or (202) 564-1786.

Attachment

cc: Melissa Hoffer, Acting General Counsel  
Dimple Chaudhary, Deputy General Counsel for Nationwide Resource Protection  
Jim Payne, Deputy General Counsel for Environmental Media and Regional Law Offices  
Elise Packard, Deputy General Counsel for Operations Programs  
OGC Associates and Directors  
Regional Counsels  
Daniel Conrad, Acting Associate Deputy General Counsel



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

Ms. Melissa A. Hoffer  
[REDACTED]

By email to: [REDACTED]

Dear Ms. Hoffer:

In anticipation of your joining the United States Environmental Protection Agency (EPA) as the Principal Deputy General Counsel on or about January 20, 2021, you have asked if you would be permitted to participate in making policy decisions regarding specific party matters in which the Commonwealth of Massachusetts is a party or intervenor. Based on your request and the information available to us, the EPA generated the enclosed list of cases.

Within the last year, you have served as the Chief of the Energy and Environment Bureau of the Office of the Massachusetts Attorney General. We understand that you participated personally and substantially in a number of these cases or supervised others who participated personally and substantially in these particular matters that involve Massachusetts as a specific party.

Upon your swearing in as a federal employee, you will have a "covered relationship" with the Commonwealth of Massachusetts pursuant to 5 C.F.R. § 2635.502(b)(iv) and, for one year, must be mindful to avoid an appearance of a loss of impartiality in the performance of your official EPA duties. You do not have any significant financial interest in the Commonwealth of Massachusetts, so the Office of General Counsel does not determine that you had any conflicting financial interest. What remains is an impartiality concern.

Federal ethics regulations permit federal officials to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). These factors are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and



(6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Since we have already determined that you have no substantial conflicting financial interest arising from your employment with Massachusetts, we turned to the six impartiality factors listed in 5 C.F.R. § 2635.502(d), taking each one into careful consideration.

We noted that your prior employment was with a State rather than a private entity. Generally, States share responsibility with EPA in protecting human health and the environment. In fact, with respect to many of our statutes, EPA has directly delegated regulatory and enforcement authority to states. That said, we also appreciate that, in some situations, States are directly regulated by this Agency.

We are mindful of the fact that the position description for the Principal Deputy General Counsel includes "First Assistant" duties for the General Counsel under the Vacancies Reform Act of 1998, 5 U.S.C. § 3345. We therefore considered the interests of the United States Government in a senior political appointee's ability to make policy decisions as to whether or not to continue to pursue current litigation, particularly at the onset of a new administration in the absence of a confirmed General Counsel or Administrator. Although we recognize that you face bar restrictions limiting your ability to participate in these cases substantively, we determined that your participation is not related to the underlying merits of any case but rather you would be making policy decisions only.

After careful consideration of the relevant factors, we conclude that the interest of the federal government outweighs any concerns about a loss of impartiality in your ability to participate in the enclosed list of particular matters that may affect or involve the Commonwealth of Massachusetts as a party and in which you may have participated personally and substantially. After joining the EPA as Principal Deputy General Counsel, you will be permitted to participate in discussions and meetings related to the policy decisions related to these cases. We remind you, however, not to participate in the merits of the cases nor to reveal any client confidences.

Please feel free to contact me or Jim Payne, Designated Agency Ethics Official, if you have any further questions. I can be reached at fugh.justina@epa.gov or (202) 564-1786; Jim can be reached at payne.jim@epa.gov or (202) 564-0212.

Sincerely yours,

Justina Fugh

Digitally signed by Justina  
Fugh  
Date: 2021.01.19  
18:45 38 -05'00'

Justina Fugh

Director, Ethics Office and

Alternate Designated Agency Ethics Official

enclosure

**LIST OF CASES IN WHICH MASSACHUSETTS IS A PARTY OR INTERVENOR**  
**PENDING IN EPA'S OFFICE OF GENERAL COUNSEL**

**Commonwealth of Massachusetts**

Defendant Intervenor:

- *Wisconsin v. EPA*, D.C. Cir. 16-1406 - petition for review of EPA's Final Rule titled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS" 81 Fed. Reg. 74,504 (October 26, 2016)
- *Competitive Enterprise Institute v. EPA*, D.C. Cir. 20-1145 - petition to review "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks" Fed. Reg. 24174-25278 (April 30, 2020)
- *Murray Energy v. EPA*, 16-1127 D.C. Cir. - petition for review of EPA's final action entitled "Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units at 81 Fed. Reg. 24,420 (April 25, 2016)
- D.C. Cir. 16-1430 (defend EPA medium and heavy-duty truck GHG standards)

Intervenor:

- *League of United Latin American Citizens (LULAC), et al. v. EPA*, 9<sup>th</sup> Cir. 17-71636 - Challenge to March 29, 2017 order denying PANNA/NRDC FFDCA petition
- *North Dakota v. EPA*, D.C. Cir. No.15-1381 - EGU GHG 111(b)

Petitioner

- D.C. Cir. 19-1230 (SAFE CA waiver )
- *New York et. al. v. Wheeler et. al.*, S.D.N.Y. 19-11673 - Challenge to the rule repealing the 2015 definition of "waters of the United States" under the CWA and reinstating the prior regulatory definition.
- *New York et. al. v. EPA*, D.C. Cir. 17-1273 - petition for review of EPA's final action titled "Response to the December 9, 2013, Clean Air Act Section 176A Petition From Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont," 82 Fed. Reg. 51,238 (November 3, 2017)
- *New York et. al. v. EPA*, D.D.C. 1:18-cv-00773 - for failure to establish guidelines for standards of performance for methane emissions from existing oil and gas operations
- *New York et. al. v. EPA*, D.C. Cir. 18-xxxx - petition for review of EPA's notice entitled "Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program," 83 Fed. Reg. 18,431 (April 27, 2018)
- *New York et. al. v. Wheeler et. al.*, 9<sup>th</sup> Cir. 19-71982 - Petition for review of "Chlorpyrifos; Final Order Denying Objections to March 2017 Petition Denial Order"
- *New York et. al. v. EPA*, D.C. Cir. 19-1165 - petition for review of EPA's final agency action entitled "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," published at 84 Fed. Reg. 32,520 (July 8, 2019)
- *New York et. al. v. EPA*, D.C. Cir 20-1437 - petition for review of EPA's final action titled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Actions on Petitions for Reconsideration" at 85 Fed. Reg. 55,286 (Sept. 4, 2020)
- *New York et. al. v. EPA*, S.D.N.Y. 1:21-cv-00252 - for failure to approve or disapprove Good Neighbor state implementation plans for the 2015 ozone NAAQS for 6 states (IN, KY, MI, OH, TX, WV)

- *New York et. al. v. EPA*, S.D.N.Y. 1:16-cv-07827 - Failure to Act on their Petitions Under Clean Air Act Section 176A
- *California et. al. v. EPA*, D.C. Cir. Case No. 21-XXXX – petition for review of final agency action entitled “Control of Air Pollution from Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures,” published at 86 Fed. Reg. 2,136 (Jan. 11, 2021).
- *California et. al. v. Wheeler et. al.*, N.D. Cal. 3:20cv03005 – NWPR
- *California et. al. v. EPA*, N.D. Cal. 3:17-cv-06936; 4:17-cv-06936 - for Failure to Issue Designations for 2015 Ozone National Ambient Air Quality Standards
- *California et. al. v. EPA*, D.C. Cir. 20-1357 - Petition for review challenging the Oil & Gas Policy Rule: “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review” 85 Fed. Reg. 57,018 (Sept. 14, 2020)
- *California et. al. v. EPA*, D.C. Cir. 21-1014 - petition for review of EPA's final action entitled “Review of the National Ambient Air Quality Standards for Particulate Matter,” published at 85 Fed. Reg. 82,684 (Dec. 18, 2020)
- *Commonwealth of Massachusetts et. al v. EPA*, 3:03-CV-984 D. Conn. - Failure to list CO2 as a criteria pollutant
- *Commonwealth of Massachusetts et. al v. EPA*, D.C. Cir. 20-1221 - Petition for Review of EPA’s National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review at 85 Fed. Reg. 31,286 (May 22, 2020) (aka MATS)
- *New Jersey et. al. v. EPA*, S.D.N.Y. 1:20-cv-01425 - for Failure to Perform Nondiscretionary Duty to Promulgate Federal Implementation Plans for the Good Neighbor Provision Requirements for the 2008 Ozone NAAQS
- *American Lung Association v EPA*, D.C. Cir No. 19-1440 – ACE litigation
- D.C. Cir. No. 20-1145
- N.D. Cal. No. 19-cv-03807 (TSCA asbestos reporting)
- Ninth Cir. No. 20-73276 (methylene chloride risk evaluation)
- N.D. Cal. No. 20-cv-04869 (limiting state authority re Section 401 water quality certifications)
- MA-led amicus in support of challenge to WOTUS, D-Mass 12/20 (do not have docket no.)

### **Massachusetts Department of Environmental Protection**

#### **Defendant:**

- *Alderson v. EPA et. al.*, 1:10-cv-10793 (appears dismissed but displayed as active?)
- *PSD Appeal No. 14-02*, E.A.B.- PSD permit issued by Massachusetts DEP
- *Brooks v. EPA et. al.*, 1<sup>st</sup> Cir. 14-2252, petition for review of Notice of Decision To Issue a Clean Air Act PSD Permit for Salem Harbor Redevelopment Project
- *Rauseo v. Army Corps of Engineers et. al.*, D. Mass. 1:17-cv-12026-NMG - Failure to exercise jurisdiction over filled wetlands

#### **ADDITIONAL CASES:**

- *Greenroots, Inc. and Conservation Law Foundation v. EPA*, (District of Massachusetts, Case No. 1:21-cv-10065) (Mass is not a party but the case involves some complaints filed with ECRCO against Mass agencies.)
- Intervenor, Newmont USA Limited v. EPA, No. 04-1069 (Challenge to 2002 NSR reform rule treatment of fugitive emissions)
- Petitioner, State of New York v. EPA, No. 20-1022 (Challenge to 2019 RMP Rule) (consolidated under Air Alliance Houston v. EPA, No. 19-1260)

Added 1/21/21: GAS PROCESSORS ASSOCIATION V. EPA, 11-1023, D.C. Cir.



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

February 2, 2021

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

**SUBJECT:** Impartiality Determination to Participate in Certain Matters Involving the Commonwealth of Massachusetts

**FROM:** Justina Fugh, Alternate Designated Agency Ethics Official and Director, Ethics Office

Digitally signed by Justina Fugh  
Date: 2021.02.02  
00:03:39 -05'00'

**TO:** Melissa Hoffer  
Acting General Counsel

As the Acting General Counsel of the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the Commonwealth of Massachusetts. Within the last year, prior to being selected for this position, you served as the Chief of the Energy and Environment Bureau with the Massachusetts Attorney General's Office.

On January 20, 2021, you were appointed to the position of EPA's Principal Deputy General Counsel. The Acting Administrator approved that appointment on January 28, 2021. Based upon your appointment as the first assistant to the EPA General Counsel, you automatically became the Acting EPA General Counsel as a matter of law under 5 U.S.C. § 3345(a)(1). An incoming Principal Deputy General Counsel, appointed to that position after the General Counsel vacancy arises, may automatically serve in an acting capacity. *See* Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179 (2001).

Under President Biden's Ethics Pledge, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state government is excluded under the definition of "former employer."<sup>1</sup> Therefore the Ethics Pledge does not apply to your Massachusetts employment. Federal ethics rules, however, do not contain a similar exclusion for state government, so those rules do apply to your prior employment with the Commonwealth of Massachusetts.

What remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." You have a "covered

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<sup>1</sup> *See* Exec. Order 13989, Section 2(k), which provides that "'former employer' does not include...State or local government."

relationship” with the Commonwealth of Massachusetts under 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date your employment with the Attorney General’s Office terminated, absent an impartiality determination from me, you cannot participate in any specific party matter in which the Commonwealth of Massachusetts is a party or represents a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee’s participation outweighs concern over the questioning of the “integrity of the agency’s programs and operations.” 5 C.F.R. § 2635.502(d). The factors that we take into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee’s role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee’s duties that would reduce or eliminate the likelihood that a reasonable person would question the employee’s impartiality.

As Acting General Counsel, you are the chief legal advisor to the Agency and part of the Agency’s political leadership. In your current role as Acting General Counsel, and in your role as Principal Deputy General Counsel if you revert back within a year, you are expected to communicate freely with states, and you will be asked to participate in discussions and meetings related to particular matters that affect the Commonwealth of Massachusetts. Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as part of your official EPA duties in particular matters that involve the Commonwealth of Massachusetts with the following limitation: you must recuse yourself from participation in specific party matters in which you participated personally and substantially while employed with the Attorney General’s Office.

In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2015, you have served as the Chief of the Energy and Environment Bureau with the Massachusetts Attorney General’s Office. In this role, you oversaw the Bureau’s attorneys on matters including prosecuting civil and criminal enforcement of environmental laws, energy policy, ratepayer advocacy, defensive cases, and affirmative advocacy. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for the Attorney General’s Office. States share responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with state governmental entities on a continuing and frequent basis.

Effect of the matter upon your financial interest – We have determined that you do not have any significant financial interest in the Commonwealth of Massachusetts, so you do not have any conflicting financial interest.

Nature and importance of the employee's role – As the Acting General Counsel, you are the chief legal advisor to the Agency. Among other things, OGC lawyers provide legal counsel to EPA policymakers, shape national legislation affecting the environment, and provide legal support for the issuance of permits, the approval of environmental programs, and the initiation and litigation of enforcement actions. As Acting General Counsel, or as Principal Deputy General Counsel if you should revert back within a year, you are expected to communicate freely with states, including Massachusetts.

Sensitivity of the matter – We anticipate that there may be specific party matters in which you did not participate personally and substantially for the Massachusetts Attorney General's Office that will rise to your level of attention, merit your participation, and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation as part of your official duties as Acting General Counsel, or as Principal Deputy General Counsel if you should revert back to those duties within the year, in such matters will be of importance to the Acting Administrator and the confirmed Administrator and, therefore, is in the Agency's interests. In these situations, it may not be appropriate to reassign the matter to another employee.

Under this limited authorization, you are authorized to participate in new or future specific party matters that involve the Commonwealth of Massachusetts, but not on the very same specific party matters on which you worked on personally and substantially while employed by the Massachusetts Attorney General's Office. If the Agency determines that it has a compelling reason for your participation as an EPA official on any of those same specific party matters that you participated in personally and substantially, then you may ask OGC/Ethics to reconsider the factors and information listed above on a case-by-case basis. Unless and until you receive written authorization, you must continue to recuse yourself from those matters in which you had previously participated while OGC/Ethics considers whether the Agency's interest in your participation outweighs any impartiality concern.

You are also cognizant of your attorney bar rules that prohibit you from participating in any matter that is the same or substantially related to the same specific party matter that you previously participated in personally and substantially, unless your bar provides for and you first obtain informed consent and notify OGC/Ethics. On January 19, 2021, I issued you an impartiality determination allowing you to participate in discussions and meetings related to the policy decisions for those cases that may affect or involve the Commonwealth of Massachusetts and in which you may have participated personally and substantially. However, you were reminded not to participate in the merits of those cases nor to reveal any client confidences.



While I have issued you this determination to interact with the Commonwealth of Massachusetts with the limitation described above, you may wish to make adjustments to your duties to not participate in a particular matter that involves Massachusetts. Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters, although you are advised to confer with OGC/Ethics should such a circumstance arise.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact me at [fugh.justina@epa.gov](mailto:fugh.justina@epa.gov) or (202) 564-1786.

cc: Dimple Chaudhary, Deputy General Counsel for Nationwide Resource Protection  
Jim Payne, Deputy General Counsel for Environmental Media and Regional Law Offices  
Elise Packard, Deputy General Counsel for Operations Programs  
Daniel H. Conrad, Acting Associate Deputy General Counsel



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

**SUBJECT:** Impartiality Determination to Participate in Certain Matters Involving the North Carolina Department of Environmental Quality

**FROM:** James Payne **JAMES PAYNE**  
Designated Agency Ethics Official and Deputy General Counsel for Environmental Media and Regional Law Offices

**TO:** Michael S. Regan  
Administrator

Digitally signed by JAMES  
PAYNE  
Date: 2021.03.11  
12:17:02 -05'00'

As the Administrator of the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the North Carolina Department of Environmental Quality (NC DEQ). Within the last year, prior to being confirmed, you served as Secretary of the NC DEQ.

Under President Biden's Ethics Pledge, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state and local government is excluded under the definition of "former employer."<sup>1</sup> Therefore the Ethics Pledge does not apply to your NC DEQ employment. Federal ethics rules, however, do not contain a similar exclusion for state or local government, so those rules do apply to your prior employment with the NC DEQ.

What remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." You have a "covered relationship" with the NC DEQ under 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date your employment with the NC DEQ terminated, absent an impartiality determination from me, you cannot participate in any specific party matter in which the NC DEQ is a party or represents a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

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<sup>1</sup> *See* Exec. Order 13989, Section 2(k), which provides that "'former employer' does not include...State or local government."

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that we take into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

In reviewing these factors, I have concluded that the interest of the United States Government in your participation outweighs any concerns about your impartiality, and I am authorizing you to participate as Administrator in particular matters that involve the NC DEQ with the following limitation: you must recuse yourself from participation in specific party matters in which you participated personally and substantially while employed with NC DEQ. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2017, you have served as Secretary of the North Carolina Department of Environmental Quality. In this role, you oversaw the state agency whose mission is to protect North Carolina's environment and natural resources. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for the NC DEQ. States share responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with state governmental entities on a continuing and frequent basis.

Effect of the matter upon your financial interest – I understand that you have a defined benefit plan with the State of North Carolina. As such, you have a financial conflict of interest pursuant to 18 U.S.C. § 208. Under this criminal statute, you cannot participate personally and substantially in any particular matter that will affect the State's ability or willingness to honor its contractual obligations with respect to your state retirement interests. But pursuant to the regulatory exemptions, this personal financial interest is not a disqualifying one that raises concerns about participation in particular matters affecting the holdings of the plan or in particular matters of general applicability affecting the sponsor of the plan under the federal conflicts of interest statute. See 5 C.F.R. §§ 2640.201(c)(1)(ii) and 2640.201(c)(2). In EPA's experience, it is unlikely you, as the Administrator, will be in any position to affect the State's ability or willingness to pay these benefits to its retirees.

Nature and importance of the employee's role – You have been appointed by the President and confirmed by the Senate to serve as the EPA Administrator, which is a crucial role in guiding and planning the Agency's work. As the leader of EPA, you are expected to communicate freely with states, including North Carolina.

Sensitivity of the matter – We anticipate that there may be specific party matters in which you did not participate personally and substantially for the NC DEQ that will rise to your level of attention, merit your participation, and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation as Administrator in such matters will be in the Agency's interests given the leadership role that you serve. In these situations, it may not be appropriate to reassign the matter to another employee.

Under this limited authorization, you are authorized to participate in new or future specific party matters that involve the NC DEQ, but not on the very same specific party matters on which you worked on personally and substantially while employed by the NC DEQ. With respect to any particular matters involving the NC DEQ as a specific party and in which you previously participated personally and substantially, you have voluntarily agreed, pursuant to our advice, not to participate at all for the duration of your EPA tenure. If the Agency determines that it has a compelling reason for your participation as an EPA official on any of those same specific party matters that you participated in personally and substantially, then you may ask OGC/Ethics to reconsider the factors and information listed above on a case-by-case basis. Unless and until you receive written authorization, you must continue to recuse yourself from those matters in which you had previously participated while OGC/Ethics considers whether the Agency's interest in your participation outweighs any impartiality concern.

While I have issued you this determination to interact with the NC DEQ with the limitation described above, you may wish to make adjustments to your duties to not participate in a particular matter that involves the NC DEQ as a specific party. Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters, although you are advised to confer with OGC/Ethics should such a circumstance arise.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact Justina Fugh at [fugh.justina@epa.gov](mailto:fugh.justina@epa.gov) or (202) 564-1786.

cc: Dan Utech, Chief of Staff  
Alison Cassady, Deputy Chief of Staff for Policy  
Dorien Paul Blythers, Deputy Chief of Staff for Operations  
Kathleen Lance, Director of Scheduling and Advance  
Justina Fugh, Alternate Designated Agency Ethics Official



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

**SUBJECT:** Impartiality Determination to Participate in Certain Matters Involving the South Coast Air Quality Management District

**FROM:** Justina Fugh, Alternate Designated Agency Ethics Official  
and Director, Ethics Office

Justina Fugh

Digitally signed by Justina  
Fugh  
Date: 2021.02.22  
02:10:31 -05'00'

**TO:** Philip Fine  
Principal Deputy Associate Administrator for Policy

As the Principal Deputy Associate Administrator for the Office of Policy of the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the South Coast Air Quality Management Division. Within the last year, prior to being selected for this position, you served as the Deputy Executive Officer for the Planning, Rule Development & Area Sources Division of the South Coast Air Quality Management District (South Coast AQMD).

Under President Biden's Ethics Pledge, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state and local government is excluded under the definition of "former employer."<sup>1</sup> Therefore the Ethics Pledge does not apply to your District employment. Federal ethics rules, however, do not contain a similar exclusion for state or local government, so those rules do apply to your prior employment with the South Coast AQMD.

What remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." You have a "covered relationship" with the South Coast AQMD under 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date your employment with the South Coast AQMD terminated, absent an impartiality determination from me, you cannot participate in any specific party matter in which the South Coast AQMD is a party or represents a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. See 5 C.F.R. § 2635.502(a).

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<sup>1</sup> See Exec. Order 13989, Section 2(k), which provides that "'former employer' does not include...State or local government."

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that we take into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

In reviewing these factors, I have concluded that the interest of the United States Government in your participation outweighs any concerns about your impartiality, and I am authorizing you to participate as Principal Deputy Associate Administrator for the Office of Policy in particular matters that involve the South Coast AQMD with the following limitation: you must recuse yourself from participation in specific party matters in which you participated personally and substantially while employed with South Coast AQMD. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2015, you have served as the Deputy Executive Officer for the Planning, Rule Development & Area Sources Division of the South Coast AQMD. In this role, you oversaw all activities for the Division, including development of State Implementation Plans and Air Quality Management Plans, strategies and regulations for air pollution control, meteorology and forecasting, air quality evaluation, air toxics risk assessment, emissions inventories, socioeconomic analyses, transportation programs, and enforcement for area sources. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for the South Coast AQMD. States share responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with state governmental entities on a continuing and frequent basis.

Effect of the matter upon your financial interest – I understand that you have a defined contribution plan and a defined benefit plan with the South Coast AQMD. As such, you have a financial conflict of interest pursuant to 18 U.S.C. § 208. Under this criminal statute, you cannot participate personally and substantially in any particular matter that will affect the District's ability or willingness to honor its contractual obligations with respect to your state retirement



interests. But pursuant to the regulatory exemptions, this personal financial interest is not a disqualifying one that raises concerns about participation in particular matters affecting the holdings of the plan or in particular matters of general applicability affecting the sponsor of the plan under the federal conflicts of interest statute. *See* 5 C.F.R. §§ 2640.201(c)(1)(ii) and 2640.201(c)(2). In EPA's experience, it is unlikely you, as the Principal Deputy Associate Administrator for the Office of Policy, will be in any position to affect the District's ability or willingness to pay these benefits to its retirees.

Nature and importance of the employee's role – As the Principal Deputy Associate Administrator for Policy, you serve as a key advisor to the Associate Administrator and work with your EPA colleagues to support Agency priorities and enhance decision-making. Among other things, the Office of Policy provides expertise for regulatory policy and management, community revitalization, climate adaptation, environmental justice, environmental permitting, and stakeholder engagement. As the Principal Deputy Associate Administrator, you are expected to communicate freely with states and localities.

Sensitivity of the matter – We anticipate that there may be specific party matters in which you did not participate personally and substantially for the South Coast AQMD that will rise to your level of attention, merit your participation, and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation as Principal Deputy Associate Administrator for Policy in such matters will be of importance to the Associate Administrator, and therefore, in the Agency's interests. In these situations, it may not be appropriate to reassign the matter to another employee.

Under this limited authorization, you are authorized to participate in new or future specific party matters that involve the South Coast AQMD, but not on the very same specific party matters on which you worked on personally and substantially while employed by the South Coast AQMD. With respect to any particular matters involving District as a specific party and in which you previously participated personally and substantially, you have voluntarily agreed, pursuant to our advice, not to participate at all for the duration of your EPA tenure. If the Agency determines that it has a compelling reason for your participation as an EPA official on any of those same specific party matters that you participated in personally and substantially, then you may ask OGC/Ethics to reconsider the factors and information listed above on a case-by-case basis. Unless and until you receive written authorization, you must continue to recuse yourself from those matters in which you had previously participated while OGC/Ethics considers whether the Agency's interest in your participation outweighs any impartiality concern.

While I have issued you this determination to interact with the South Coast AQMD with the limitation described above, you may wish to make adjustments to your duties to not participate in a particular matter that involves the District as a specific party. Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters, although you are advised to confer with OGC/Ethics should such a circumstance arise.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact me at [fugh.justina@epa.gov](mailto:fugh.justina@epa.gov) or (202) 564-1786.

cc: Victoria Arroyo, Associate Administrator for Policy  
Helena Wooden-Aguilar, Deputy Associate Administrator